Supreme Court, U.S.
FILED

No. _____ 05-542 OCT 26 2005

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In The
Supreme Court of the United States

ROBERT RAY COURTNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence of 360 months imprisonment, which was the result of an upward departure from an applicable guideline range of 210 to 262 months, survives the reasonableness review now required under 18 U.S.C. § 3553(a) and the sentencing framework established by this Court in *United States v. Booker*, 125 S. Ct. 738 (2005)?

2. Whether the upward departure to 360 months imprisonment, from an applicable guideline range of 210 to 262 months, based on psychological injuries to the victims and the operation of the Guidelines grouping rules, constitutes an incorrect application of the Sentencing Guidelines, where the vulnerable victim enhancement encompassed psychological injuries and the proof at sentencing did not establish such injuries, and where the grouping provisions of the Guidelines suggest a possible departure only if there are a number of units "significantly more than five units," when there were eight units in this case which is not significantly more than five units?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Petition 7

Conclusion 18

Appendix

Second Opinion of the United States Court of Appeals for the Eighth Circuit Dated and Filed June 20, 2005 ..... App. 1

First Opinion of the United States Court of Appeals for the Eighth Circuit Dated and Filed April 5, 2004 ..... App. 5

Order of the United States District Court for the Western District of Missouri Dated December 5, 2002, Specifying Reasons for Upward Departure ..... App. 18

Letter from the United States Supreme Court, dated January 24, 2005, vacating and remanding decision to Eighth Circuit for further consideration of *United States v. Booker* ..... App. 24

Order from the United States Court of Appeals for the Eighth Circuit Dated and Filed July 28, 2005, Denying Petition for Rehearing ..... App. 26

TABLE OF AUTHORITIES

Page

CASES:

Apprendi v. New Jersey, 503 U.S. 466 (2000) 12, 13

Courtney v. United States, 125 S. Ct. 989 (2005)..... 1

Griffith v. Kentucky, 479 U.S. 314 (1997) 7

Stinson v. United States, 508 U.S. 36 (1993)..... 17

United States v. Booker, 125 S. Ct. 738 (2005).....*passim*

United States v. Christenson, 403 F.3d 1006 (8th Cir. 2005) 11

United States v. Christenson, 424 F.3d 852 (8th Cir. 2005) 11

United States v. Courtney, 412 F.3d 855 (8th Cir. 2005) 1

United States v. Courtney, 362 F.3d 497 (8th Cir. 2004) 1

United States v. Courtney, 240 F.Supp.2d 1052 (W.D. Mo. 2002) 1

United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991) 15, 16

United States v. Haack, 403 F.3d 997 (8th Cir. 2005)... 8, 10

United States v. Hadash, 408 F.3d 1080 (8th Cir. 2005) 8

United States v. May, 413 F.3d 841 (8th Cir. 2005) 11

United States v. Pizano, 403 F.3d 991 (8th Cir. 2005) 8, 11

United States v. Rogers, 400 F.3d 640 (8th Cir. 2005) 8, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

18 U.S.C. § 1365(a) 3
18 U.S.C. § 1365(a)(3) 3
18 U.S.C. § 3231 3
18 U.S.C. § 3553(a) ..... *passim*
18 U.S.C. § 3742(a)(3) 5
21 U.S.C. § 331(k) 3
21 U.S.C. § 333(a)(2) 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 5

FEDERAL SENTENCING GUIDELINE PROVISIONS:

U.S.S.G. § 1B1.2 17
U.S.S.G. § 1B1.2(c), comment. (n.3) 17
U.S.S.G. § 2N1.1(a) 3
U.S.S.G. § 2N1.1, comment. (n.1) 14
U.S.S.G. § 2N1.1(b)(1)(A) 4
U.S.S.G. § 3A1.1(b)(1) 4, 15
U.S.S.G. § 3A1.1, comment. (n.2) 15
U.S.S.G. § 3A1.1(b)(2) 4
U.S.S.G. § 3B1.3 4
U.S.S.G. § 3E1.1(a) and (b)(2) 4
U.S.S.G. § 3D1.4 ..... 4, 5, 16
U.S.S.G. § 5K2.3 14

TABLE OF AUTHORITIES – Continued

Page

RULES:

U.S. Sup. Ct. R. 10 14

U.S. Sup. Ct. R. 13.1 2

U.S. Sup. Ct. R. 13.3 2

PETITION FOR WRIT OF CERTIORARI

Robert R. Courtney respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The second opinion of the Court of Appeals for the Eighth Circuit, which again affirmed the sentence and the upward departure after remand from this Court, is reported at *United States v. Courtney,* 412 F.3d 855 (8th Cir. 2005), and reprinted in the Appendix hereto at Pet. App. 1-4. The initial opinion of the Court of Appeals for the Eighth Circuit is reported at *United States v. Courtney,* 362 F.3d 497 (8th Cir. 2004) and reprinted in the Appendix hereto at Pet. App. at 5-17. The order entered by the United States District Court for the Western District of Missouri specifying reasons for the upward departure is reported at *United States v. Courtney,* 240 F.Supp.2d 1052 (W.D. Mo. 2002), and reprinted in the Appendix hereto at Pet. App. 18-23.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit entered its original judgment on April 5, 2004. Pet. App. at 5. This Court granted Petitioner's petition for writ of certiorari and remanded the case to the Eighth Circuit for further consideration of the decision of *United States v. Booker.* Pet. App. at 24; *see also Courtney v. United States,* 125 S. Ct. 989 (2005).

After supplemental briefing on remand, the Court of Appeals for the Eighth Circuit entered its second judgment on [illegible] 20, 2005. Pet. App. at 1. The second opinion also fully reinstated the court's initial opinion. Pet. App. at 4. Petitioner timely filed a petition for rehearing and rehearing *en banc* in the Court of Appeals. Pet. App. at 4. On July 28, 2005, the Court of Appeals for the Eighth Circuit filed an order denying both the petition for rehearing and rehearing *en banc*. Pet. App. at 26. The present petition for a writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for a writ of certiorari, filed by a party to a federal criminal case, to review the judgment of a federal court of appeals.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a) provides in relevant part: "(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational

training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentences and the sentencing range established for – (A) the applicable category of the offense committed by the applicable category of defendant as set forth in the guidelines . . . (5) any pertinent policy statement . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense."

STATEMENT OF THE CASE

Petitioner Robert R. Courtney was charged by grand jury indictment with eight counts of tampering with a consumer product in violation of 18 U.S.C. §§ 1365(a) and 1365(a)(3) and twelve counts of adulteration and/or misbranding a drug in violation of 21 U.S.C. §§ 331(k) and 333(a)(2). Pet. App. at 6. The indictment alleged that Petitioner was a pharmacist who diluted chemotherapy drugs before distributing them for administration to certain cancer patients. Pet. App. at 5. The district court had proper jurisdiction pursuant to 18 U.S.C. § 3231, which provides that the district courts shall have original jurisdiction of "all offenses against the laws of the United States."

Mr. Courtney entered pleas of guilty to each count of the indictment. Pet. App. at 6. With respect to the product tampering counts, the sentencing factors used to calculate the applicable guideline range included a base offense level of twenty-five, U.S.S.G. § 2N1.1(a); a four level enhancement for causing life-threatening bodily injuries,

U.S.S.G. § 2N1.1(b)(1)(A); a two level enhancement for vulnerable victims, U.S.S.G. § 3A1.1(b)(1); a two level enhancement because there was a large number of vulnerable victims, U.S.S.G. § 3A1.1(b)(2); a two level enhancement for abuse of a position of trust, U.S.S.G. § 3B1.3; and a three level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a) and (b)(2). Pet. App. at 7-8. The guideline range also included a maximum enhancement of five levels pursuant to the grouping rules set forth in U.S.S.G. § 3D1.4(a), because each tampering count constituted a separate "unit" under the Guidelines that resulted in eight total units for the tampering offenses.[1] Pet. App. at 7-8. The group for the adulteration and misbranding offenses received no additional units by operation of the Guidelines because it was nine or more levels less serious than the groups for the product-tampering offenses. Pet. App. at 8.

The applicable offense level was determined to be 37 and the criminal history to be category I under the federal Sentencing Guidelines. Pet. App. at 8. The corresponding guideline range of punishment was 210 to 262 months imprisonment. Pet. App. at 8. The district court departed upward from this range to impose a significantly higher sentence of 360 months imprisonment. Pet. App. at 8.

The district court expressed four reasons for upward departures. *See generally* Pet. App. at 18-23. Only two grounds, however, were addressed by the Eighth Circuit in its initial opinion. *See generally* Pet. App. at 5-17. One reason for departure was that the grouping rules of the Sentencing Guidelines resulted in Counts Six through

[1] The Guidelines provide that the offense level should be enhanced five levels for a number of units "more than 5." U.S.S.G. § 3D1.4.

Eight and Counts Nine through Twenty of the indictment being "disregarded." Pet. App. at 18-20. The district court relied on the commentary to section 3D1.4, which states that a departure may be warranted "in the unusual case where the additional offenses resulted in a total of significantly more than 5 units." Pet. App. at 19; *see also* U.S.S.G. § 3D1.4, comment. (backg'd). The other reason for departure was that the offense conduct caused psychological injuries to the victims. Pet. App. at 20-21.

The Eighth Circuit issued its first opinion affirming the sentence and the upward departure on April 5, 2004. Pet. App. at 5. The Eighth Circuit had proper jurisdiction pursuant to 18 U.S.C. § 3742(a)(3), which provides that a defendant may file a notice of appeal to review an otherwise final sentence if the sentence is greater than the sentence specified in the applicable guideline range. The Eighth Circuit also had proper jurisdiction as conferred by 28 U.S.C. § 1291, which provides for jurisdiction of the court of appeals over appeals from final judgments of the district courts, except where direct review may be had in the Supreme Court.

With regard to Petitioner's argument that eight units are not "significantly more than 5 units" to justify an upward departure under the grouping provisions of the Guidelines, the Eighth Circuit concluded that the Guidelines computations should have proceeded as if there had been 152 additional counts of product-tampering charges, based on additional relevant conduct admissions in the plea agreement. Pet. App. at 10-11. Because the additional acts of dilution involved twenty-six additional victims, the court of appeals concluded that there should have been either thirty-four or twenty-six total units for product tampering, which is "significantly more than 5 units" to

support a departure under the grouping provisions. Pet. App. at 11.

The Eighth Circuit also upheld the upward departure for causing extreme psychological injuries. Pet. App. at 13-16. The court concluded that victim impact letters submitted to the probation office, which generally explained the impact of the offense, were adequate evidence to support the upward departure. Pet. App. at 13-16.

Petitioner timely submitted a Petition for Writ of Certiorari to the United States Supreme Court. On January 24, 2005, this Court granted the petition for a writ of certiorari and remanded the case to the Eighth Circuit for further consideration of the Court's opinion in *United States v. Booker*. Pet. App. at 24.

The Eighth Circuit issued its second opinion affirming the sentence on June 20, 2005. Pet. App. at 1-4. On remand, Petitioner submitted that his sentence was unreasonable under the framework established in *United States v. Booker*, 125 S. Ct. 738 (2005). The Eighth Circuit concluded that the *Booker* decision would not affect the outcome in this case, as the standard of review and the factual record were unaffected by *Booker*. Pet. App. at 2. Petitioner presented several mitigating factors that should now be reconsidered under 18 U.S.C. § 3553(a). In rejecting these arguments, the Eighth Circuit indicated that the mitigating factors were brought to the district court's attention at sentencing in a downward departure motion filed by Petitioner. Pet. App. at 3. The Eighth Circuit also indicated that it had previously conducted a reasonableness inquiry in its first opinion. Pet. App. at 3-4. The court held that the sentence of 360 months was reasonable. Pet.